NO. 22727

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LEON LEONARD MIZRAHI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellant.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

Appellant LEON LEONARD MIZRAHI was indicted by the Federal Grand Jury for the Southern District of California, Central Division, on May 25, 1967, in Case No. 37153-CD [C. T. 2-3]. 1/ The Indictment charged a violation of Title 50 Appendix, United States Code, Section 462, Universal Military Training and Service Act; Refusal to be Inducted.

1/ "C. T." refers to Clerk's Transcript of Record.

On June 19, 1967, appellant was arraigned before the Honorable William P. Gray, United States District Judge and entered a plea of not guilty [C. T. 4]. Appellant was represented by retained counsel at all stages of the proceedings. On October 5, 1967, a jury trial commenced before the Honorable Francis C. Whelan, United States District Judge. The decision was continued until November 29, 1967, on which date the appellant was found guilty. Appellant was sentenced to the custody of the Attorney General for a term of three years with bond on appeal set at $250.00 personal surety [C. T. 39]. A timely notice of appeal was filed on December 6, 1967 [C. T. 39].

The jurisdiction of the District Court was based on Title 26, U.S.C. §4705(a), Title 18, U.S.C. §3231, and Rule 18, Federal Rules of Criminal Procedure.

II

APPLICABLE STATUTES AND REGULATIONS

A.

Title 50 App., Section 462, United States Code, provides in part:

> "Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title . . . or the rules or regulations made or directions given thereunder, who shall knowingly fail or

neglect to perform such duty . . . or who otherwise evades or refuses . . . service in the armed forces or any of the requirements of this title . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title . . . or rules, regulations or directions made pursuant to this title . . . shall, upon conviction in any District Court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both . . . .

"Every registrant, after his classification is determined by the local board (except a classification which is itself determined upon an appearance before the Local Board under the provisions of this part), shall have an opportunity to appear in person before the member or members of the Local Board designated for the purpose if he filed a written request therefor within 10 days after the local board has mailed a Notice of Classification (SSS Form No. 110) to him. Such 10-day period may not be extended."

B.

32 C. F. R. 1626. 2(a) provides in pertinent part:

"The registrant . . . may appeal to an appeal board from the classification of a registrant by

the local board."

C.

32 C. F. R. 1626. 2(c) provides in pertinent part:

"The registrant . . . may take an appeal authorized under paragraph (a) of this section at any time within the following periods:

"(1) Within 10 days after the date the local board mails to the registrant a Notice of Classification (SSS Form No. 110)."

D.

32 C. F. R. 1626. 11(a) provides in pertinent part:

"Any person entitled to do so may appeal to the appeal board by filing with the Local Board a written notice of appeal. . . ."

E.

32 C. F. R. 1641. 2(b) provides in pertinent part:

"If a registrant or any other person concerned fails to claim and exercise any right or privilege within the required time, he shall be deemed to have waived the right or privilege."

F.

32 C. F. R. 1625. 2 provides in pertinent part as follows:

"The Local Board may reopen and consider anew the classification of a registrant . . . provided, . . . the classification of a registrant shall not be reopened after the Local Board has mailed to such

registrant an order to report for induction (SSS Form No. 252) . . . unless the Local Board first specifically finds that there has been a change in the registrant's status resulting from circumstances over which the registrant has no control."

G.

32 C. F. R. 1625. 4 provides in pertinent part:

"When a registrant . . . files with the Local Board a written request to reopen and consider anew the registrant's classification and the Local Board is of the opinion that the information accompanying such request fails to present any facts in addition to those considered when the registrant was classified or, even if new facts are presented, the local board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not reopen the registrant's classification, ..."

H.

32 C. F R. 1642. 2 provides in pertinent part:

"When it becomes the duty of a registrant . . . to perform an act or furnish information to a Local Board or other office or agency of the Selective Service System, the duty or obligation shall be a continuing duty or obligation from day to day and the failure to properly perform the act or the

supplying of incorrect or false information shall in no way operate as a waiver of that continuing duty."

III

STATEMENT OF FACTS

At the time of the trial of this case, a photographic copy of the official Selective Service System file of this appellant was offered and admitted into evidence as Government's Exhibit No. 1 [R. T. 11]. 2/

This file revealed the following facts with respect to appellant's registration status in the Selective Service System.

On May 22, 1956, the defendant registered with Local Board No. 118, in Gardena, California (pp. 1 and 2). 3/ On June 10, 1957, the Board received a Classification Questionnaire (SSS Form 100), in which no claim as a conscientious objector was made (pp. 5-11 at p. 12, Series XV). On June 3, 1959, by a vote of 3-0 the defendant was placed in Class I-A (p. 12), and notice of said classification was mailed to the defendant (SSS Form 110), (p. 12).

On October 28, 1959, the Board received an Undergraduate College Student Certificate (SSS Form 109), indicating defendant

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2/ "R. T." refers to Reporter's Transcript of Record.

3/ Refers to pages of appellant's Selective Service File, Government's Exhibit No. 1.

was a student at the University of California and achieved a scholastic standing within the upper one-quarter of his class (p. 16). On November 4, 1959, the Board by a vote of 3-0 placed the defendant in Class II-S, student deferment until June, 1960, and a notice of such classification was mailed to the defendant (p. 12). Between September, 1960, and June, 1964, the defendant attended and graduated from the University of California School of Medicine during which time defendant remained classified II-S, student deferment (pp. 12 and 20-31).

On August 14, 1964, the Board received a completed Current Information Questionnaire (SSS Form 127) (pp. 32 and 33). On August 20, 1964, defendant was ordered for an armed forces physical examination on September 30, 1964 (p. 36). On August 28, 1964, the Board received a letter from the University of Kansas Medical Center indicating the defendant had commenced his internship on July 1, 1964 (p. 38). On September 9, 1964, the Board by a vote of 2-0 placed the defendant in Class 2-A, occupational deferment, until July, 1965 (p. 12). Notice of said classification was mailed to the defendant (p. 12).

On October 12, 1964, and again on October 28, 1964, defendant was ordered for an armed forces physical examination (pp. 41 and 42). On January 6, 1965, the Board by a vote of 2-0, placed the defendant in Class I-A (p. 12). On March 9, 1965, the Board received a letter from the defendant asking why his classification had been changed from II-A, Occupation Deferment to I-A, Available for Service. The defendant also inquired whether

his name had been selected for the April draft of physicians (p. 43). On March 10, 1965, the Board wrote the defendant indicating the change in his classification was due to the need for doctors in the armed forces, and that he would be allowed to complete his internship (p. 45). On March 29, 1965, defendant was found acceptable for induction into the armed forces (DD Form 62) (p. 48). On April 13, 1965, the defendant was ordered for induction on July 1, 1965 (p. 50). On April 13, 1965, the date defendant's induction order was mailed he wrote the Board asking about his draft status (p. 54). On April 20, 1965, the Board in answer to defendant's letter affirmed that he had been ordered for induction on July 1, 1965 (p. 56).

On April 26, 1965, the Board received a letter from the United States Public Health Service that the defendant had applied for a commission in that service and requested a statement as to his induction status (p. 57). On April 26, 1965, the Board wrote the United States Public Health Service that the defendant had been ordered for induction on July 1, 1965 (p. 58). On April 26, 1965, Dr. B. M. Kagan wrote the Board that the defendant had been accepted as a resident in pediatrics and requested that he be deferred (pp. 59 and 60). On April 29, 1965, the Board was notified by the State Director of Selective Service to cancel defendant's order for induction as a result of his residency training (p. 62). On April 29, 1965, defendant was notified of this cancellation (p. 63). On August 26, 1965, prior to the cancellation of his order for induction defendant had been allocated for service

to the U. S. Navy (p. 65). On April 28, 1965, the United States Public Health Service wrote the defendant indicating he must be accepted to their service before the date of his original order of induction (p. 67). On April 29, 1965, the U. S. Navy wrote defendant concerning application for a commission (p. 69). On August 4, 1965, by a vote of 2-0, the Board placed defendant in Class II-A, Occupational Deferment until August, 1966 (p. 13).

On October 7, 1965, defendant's file was forwarded to Selective Service Headquarters (p. 11), and returned to the Board on October 21, 1965 (p. 11), with the recommendation that defendant be classified under the provisions of Operations Bulletin No. 280 (p. 80). On October 7, 1965, defendant was ordered for the armed forces physical examination on October 28, 1965. On October 28, 1965, the defendant failed to report for his physical examination and on October 29, 1965, wrote the Board his failure to appear was a result of a conflict in his work schedule (p. 81). On November 3, 1965, the defendant was again ordered for a physical examination on November 19, 1965 (p. 84). On November 29, 1965, the Board received a letter from Dr. B. M. Kagan requesting that the defendant be deferred so that he could complete his residency training to July 1, 1967 (p. 86).

On January 24, 1966, the Board by a vote of 2-0 placed the defendant in Class I-A (p. 13). A notice of said classification was mailed to the defendant (p. 13). On January 25, 1966, a statement of acceptability for service was mailed the defendant (p. 89). On January 31, 1966, the Board received a letter from

the defendant appealing his I-A classification (p. 90). On January 31, 1966, defendant's file was forwarded to the Appeal Board and on February 24, 1966, by a vote of 3-0 defendant was classified in Class I-A (p. 4). A notice of said classification was mailed defendant on that date (p. 13). On February 28, 1966, defendant was ordered for induction on March 15, 1966 (p. 94).

On the same date that the order of defendant's induction was mailed to him February 28, 1966, the Board received a letter from defendant claiming status as a conscientious objector and requesting the necessary forms (p. 98), which were mailed to defendant on March 2, 1966 (p. 13). On March 7, 1966, the Board received a letter from the defendant stating his induction should be cancelled while his request for a I-O classification is processed.

On March 8, 1966, the Board received the defendant's completed Special Form for Conscientious Objector (SSS Form 150), in which the defendant stated in substance as follows: that his beliefs are based on his "Jewish upbringing and religious training", his training as a physician, his respect for life, the principle derived from the Nuremberg trial "that the individual alone is responsible for his actions no matter from where he is ordered" (page 105).

In answer to Series 4, requesting the name and present address of the individual upon whom he relies most for religious guidance, the defendant answered "myself" (p. 106). In response to Series 6, requesting the action and behavior in his life that most conspicuously demonstrates the consistency and depth of his

religious convictions, the defendant answered: "Participation in demonstrations against the war in Vietnam both in Los Angeles and in Berkeley, California (p. 106).

Finally, the defendant stated:

> "It is my sincere and true belief that the war the United States Armed Forces are fighting in Vietnam is unjust and that even an order of my country to participate in any form would not relieve me of my conscientious responsibility for such an immoral and unreligious act." (p. 105)

On March 10, 1966, the following entry appears in the Selective Service file: "Board members contacted, file reviewed, new information does not warrant reopening of classification. Must report for Induction as ordered." This entry is followed by a vote of 3 to 0. Notice of the board's decision was mailed to the defendant on March 11, 1966 (p. 110).

On March 14, 1966, defendant called the board and indicated that he had contacted National Headquarters and wished to know if the board had received any information (p. 112).

On March 15, 1966, the defendant reported to the induction station and thereafter refused induction into the armed forces as ordered (pp. 113-115).

IV

QUESTIONS PRESENTED

1. THE SUBMISSION BY THE APPELLANT OF A LATE CONSCIENTIOUS OBJECTOR CLAIM WITH NO FACTS SHOWING A CHANGE OF STATUS OVER WHICH HE HAD NO CONTROL PRECLUDED THE LOCAL BOARD FROM REOPENING HIS CASE.

2. THE INDUCTION NOTICE WAS TIMELY MAILED AS NO FURTHER RIGHT TO APPEAL EXISTED FOR THE APPELLANT.

V

THE SUBMISSION BY THE APPELLANT OF A LATE CONSCIENTIOUS OBJECTOR CLAIM WITH NO FACTS SHOWING A CHANGE OF STATUS OVER WHICH HE HAD NO CONTROL PRECLUDED THE LOCAL BOARD FROM REOPENING HIS CASE.

The Selective Service file of the appellant, introduced into evidence as Government's Exhibit No. 1, indicates several key dates which are crucial to a proper determination of this case. On February 28, 1966, two events occurred: First, an order for induction was mailed, the induction date being March 15, 1966. Second, the local board received a letter in which appellant claimed to be a conscientious objector and also requested he be sent a

Form SSS No. 150, Special Form for Conscientious Objectors (page 98 of Government's Exhibit No. 1). On March 8, 1966, one week before the scheduled induction date, the appellant submitted a completed Form SSS 150. On March 15, 1966, the appellant refused induction.

The governing regulation in this case is 32 C. F. R. 1625. 2, which provides a pertinent part as follows:

> "The local board may reopen and consider anew the classification of a registrant . . . upon the written request of the registrant . . . if such request is accompanied by written information presenting facts not considered when a registrant was classified which, if true, would justify a change in the registrant's classification; . . . provided the classification . . . of a registrant shall not be reopened after the local board has mailed to such registrant an order to report for induction . . . unless the local board first specifically finds that there has been a change in the registrant's status resulting from circumstances over which the registrant had no control." (emphasis added)

It is clear, therefore, from a reading of the last clause of the regulation that before a reopening would be permissible, it would be mandatory for the board to find that a change of status had occurred beyond the control of the registrant.

Considering first the letter of February 28, 1968, no facts whatsoever were presented by the appellant upon which the board could have made such a determination. That letter merely claimed the status of conscientious objector and in addition requested an SSS 150 form. Viewing the letter only as what the board had before it, it is clear that " . . . there was nothing to show that there was a change of status to be considered".

United States v. Dugdale, 384 F. 2d 482, 485 (9 Cir. 1968).

Turning next to the form submitted by the appellant on March 8, 1966, there can be no dispute whatsoever that this is an untimely, or late, conscientious objector claim. The application of the pertinent provision of 32 C. F. R. 1625. 2, is without doubt.

The appellant, however, chose in his brief virtually to ignore the regulation which governs this case. Rather, appellant views the brief letter that arrived the same date as the mailing of the induction notice, and the SSS Form 150 which arrived over a week after the notice was mailed, as somehow timely. In his quotation of 32 C. F. R. 1625. 2, found on page 15 of Appellant's Brief, he presents the "relevant part" and thereby completely omits the proviso governing the late claim. Concluding that it is therefore a timely claim, appellant then, in part two of his brief beginning at page 20, commences to make out a standard argument that would be applicable if appellant's were a timely claim. Even if the argument is valid, it has no relevance whatsoever to a late claim situation as in the present case.

Appellant makes brief mention only of the fact that this case at bar might include the issue of a late claim. On page 20 of his brief, appellant there concedes that 32 C. F. R. 1625. 2 contains the additional proviso concerning a late claim. But, concludes the appellant, "that proviso is not pertinent here . . ." (Appellant's Brief, p. 20). His reasoning is " . . . because the local board, by placing its refusal to re-open on the sole ground that the 'new information does not warrant reopening of classification' . . . appears thereby to have treated appellant's claim as an application filed prior to the mailing of his induction notice." (Appellant's Brief, p. 20).

The Selective Service file and the transcript of trial reflects nothing to indicate that the board treated appellant's claim arriving over a week after the induction notice was mailed, as "timely". In fact, the appellant himself at the trial introduced a letter in which he himself stated that he phoned the board and "I was told that since I had requested SSS -- 150 form and C. O. status after induction orders had been mailed I am not subject to the usual processing of C. O." [R. T. p. 54].

Furthermore, appellant completely ignores the mandatory language of the regulation. After the Notice of Order for Induction (SSS Form No. 252), is mailed to the registrant, the Local Board has no authority but rather is forbidden to reopen registrant's classification unless it specifically finds a change in the registrant's status resulting from circumstances over which registrant had no control. 32 C. F. R. 1625. 2.

Boyd v. United States, 269 F. 2d 607, 609-10
(9 Cir. 1955);
Feuer v. United States, 208 F. 2d 719
(9 Cir. 1953);
Miller v. United States, 388 F. 2d 973
(9 Cir. 1967);
Keene v. United States, 266 F. 2d 378, 383
(10 Cir. 1959).

The circumstances relied upon to show a change must have occurred after the induction notice was mailed.

Keene v. United States, supra, at 384;
United States v. Bonga, 201 F. Supp. 908
(D. Mich. 1962).

Since the applicable regulation is the late claim provisions of 32 C. F. R. 1625. 2, it was incumbent upon the appellant " . . . to submit statements and information which, if true, would be a basis for the change in classification. He was required to show a 'change of status' occurring after receipt of the induction notice. "

United States v. Dugdale, supra, p. 484.

On his form for conscientious objectors, SSS Form 150, the appellant indicated his views were acquired through his Jewish upbringing and training, his education as a physician and the learned principles of the Nueremberg trial.

In United States v. Dugdale, the appellant there had acquired his views " . . . through his home life, his contacts with acquaintances and friends, and his reading of literature. " United States v.

Dugdale, supra, p. 484. There, this Court pointed out the crucial requirement under the governing regulation: " . . . None of his reasons are consistent with any claim that his views matured or changed after receipt of the induction notice." United States v. Dugdale, supra, p. 484.

That conclusion is equally applicable to the instant case, wherein none of the facts whatsoever submitted by appellant indicate any change of views after receipt of the induction notice.

Furthermore, appellant indicated that he had shown his views through demonstrations in Los Angeles and Berkeley. This fact leads to the inescapable conclusion that any conscientious objector beliefs that appellant may have had indeed came to fruition and existed in a period considerably before the mailing of the induction notice.

It is clear, therefore, that the board in considering the SSS Form 150, had no facts whatsoever before it by which it could make a finding that there was a change in the registrant's status resulting from circumstances beyond his control occurring after mailing of the induction notice.

United States v. Dugdale, supra, at 485;

See also United States v. Briggs, No. 21363

(9 Cir., June 26, 1968).

The record of trial reflects that the meeting of the board on March 10 was held when the clerk, Mrs. Mary L. Armand, contacted two members of the local board by telephone, and that an actual face to face meeting did not take place [R. T. 19].

Appellant cites certain operational memorandum of the Selective Service System dated October 18, 1967 and June 10, 1968, as standing for the proposition that telephonic decisions do not comply with the Selective Service regulations [Appellant's Brief, p. 18]. Appellant, however, does not and cannot contend that these regulations -- the only ones cited -- somehow apply to a fact situation in 1966.

Nevertheless, even if in 1966 such a telephonic meeting were improper, the controlling question that must be asked is this, what possible prejudice has inured to the appellant by virtue of this procedure?

It is well settled that procedural irregularities or omissions which do not result in prejudice to the registrant are to be disregarded. Yaich v. United States, 283 F. 2d 613 at 620 (9 Cir. 1960), and cases cited therein.

In the instant case, no prejudice has resulted and none has been proffered to exist. Only a strained construction of the section would require that the members of the local Board be present together to consider information which conclusively on its face would not allow a reopening of the defendant's classification.

In United States v. Porter, the court was faced with a similar situation. An induction order was mailed on August 1, 1960, the reporting date was August 9, 1960, and on August 8, 1960, the appellant requested a conscientious objector form and stated that he was a conscientious objector. Petitioner was indicted under Title 50 App.

U. S. C. §462(a), tried and convicted. That conviction was affirmed on appeal. United States v. Porter, 314 F. 2d 833 (7 Cir. 1963). Petitioner subsequently filed a motion to vacate his sentence under Title 28, U. S. C. §2255, on the ground that, unknown to him earlier, the Local Board had never convened to consider the additional data he filed concerning his religious convictions or also his change in marital status. Petitioner appealed from denial of his motion in the U. S. District Court. The court held as follows:

> "After careful study of the record, we are constrained to conclude that the evidence submitted by the petitioner was legally insufficient to cause re-opening of his classification. Any procedural irregularity which may have occurred here did not result in prejudice to petitioner and thus did not attain to the gravity of a denial of due process."
>
> Martin v. United States, 190 F. 2d 775, 779 (4 Cir. 1951).
>
> United States v. Porter, 334 F. 2d 792 (5 Cir. 1963).

Furthermore, the practical implication of holding that the board must specially meet any time new information is provided, or cancel the induction order, " . . . would work havoc upon the Selective Service System and manpower quotas could rarely be met with any reasonable degree of certainty." United States v. Geary, 379 F. 2d 915, 918 (2 Cir. 1967). See Keene v. United

States, 266 F.2d 378, 383-84 (10 Cir. 1959).

It is, therefore, apparent that the appellant filed a late conscientious objector claim, that under the applicable regulation the board must make a finding of a change in circumstances beyond the registrant's control occurring after the notice for induction is mailed, that no facts whatsoever were submitted by appellant either by his letter or by the conscientious objector form, and that regardless of the propriety of the telephone local board meeting, no possible prejudice inures to the defendant since even had the board met in proper session, there would have been no facts whatsoever before it to allow a finding of a change in circumstances occurring after notice for induction was mailed.

VI

THE INDUCTION NOTICE WAS TIMELY MAILED AS NO FURTHER RIGHT TO APPEAL EXISTED FOR THE APPELLANT.

Appellant contends as follows: "The induction notice was invalid and void because mailed before the expiration of appellant's time for appeal had expired."

Appellant further cites the provisions of 32 C.F.R. 1626.41, which provides as follows:

> "The local board shall not issue an order for a registrant to report for induction either during the period afforded the registrant to take an appeal to the appeal board or during the period such an appeal is pending. Any order to report for induction which has been issued during either of such periods shall be ineffective and shall be cancelled by the local board. Whenever an appeal to the appeal board has been taken by a person entitled to do so, any order to report for induction which has previously been issued to the registrant shall be ineffective and shall be cancelled by the local board."

The facts in the instant case, however, clearly indicate that this regulation is inapplicable. The Selective Service file reflects that on January 24, 1966, the appellant was classified in Class I-A; that on January 31, 1966, the board received the

appellant's letter of appeal; that on the same date, January 31, the board forwarded the file to the Appeal Board, and that on February 25, 1966, the file was returned from the Appeal Board with the appellant classified I-A by a 3-0 vote [Government's Ex. 1, p. 13].

As can be seen from the above facts, the appellant had in fact appealed and the decision of the Appeal Board had been returned to the local board, after which a notice for induction was mailed. The appellant had no further right of appeal, since the Appeal Board decision was unanimous, and only if the Appeal Board decision involved a dissent would an appeal lie to the President [32 C.F.R. 1627.3].

Appellant on pages 27 and 28 of his Brief, cites 32 C.F.R. 1626.61(b) as controlling. That regulation provides as follows:

> "At any time within 10 days after the date when the local board mails to the registrant a Notice of Classification (SSS Form No. 110) . . . or at any time before the registrant is mailed an Order to Report for Induction (SSS Form No. 252), the government appeal agent, if he deems it to be in the national interest or necessary to avoid an injustice, may prepare and place in the registrant's file a recommendation that the State Director of Selective Service either request the appeal board to reconsider its determination or appeal to the President. The registrant's file shall then be

forwarded to the State Director of Selective Service . . . . "

Appellant then contends that:

" . . . the record fails to show that the Local Board advised appellant that an appeals agent might, in an appropriate case, seek reconsideration of his appeal under Selective Service Regulations §1626.61(b). Since this was obviously an important and substantial right, the Board's omission deprived the appellant of due process of law." [Appellant's Br., p. 31].

For this proposition, appellant cites two cases: United States v. Giessel, D.C.N.J., 1955, 129 F.Supp. 223; and United States v. Sobczak, D.C.Ga., 1966, 264 F.Supp. 752.

The Giessel case in no way refers to the proposition for which it is cited. That case refers solely to a situation regarding a right to consult with a Selective Service advisor, pursuant to the appeal rights provided in 32 C.F.R. 1626.41. As indicated above, the appellant had already availed himself of said right to appeal.

Furthermore, the Sobczak case is also not in point in that it involved a registrant who, after requesting a conscientious objector form, was not supplied one by his local board. In addition, that board did not inform him of any right to a hearing in connection with a conscientious objector claim. This case in no way makes reference to the provisions of 1626.61(b), which simply do not

contain any "substantial rights" of the appellant about which he must be advised.

Appellant further contends that " . . . by mailing the induction notice prematurely, and by failing to advise appellant of his rights under Selective Service Regulations §1626.61(b), the Local Board deprived appellant of the opportunity and possibility of securing a change in his classification through an appeal agent, and thereby vitiated its induction order." [Appellant's Br. p. 32].

For this proposition appellant cites the case of United States v. Steppler, C.A. 3rd, 1958, 258 F.2d 310, 315. That case has no application whatsoever to the issues of this appeal. In Steppler a local board had erroneously denied the registrant a ministerial classification and the State Director had suggested this error to the local board in that it had denied classification on a basis not in accord with the applicable regulations. The local board refused to reopen and reconsider the classification and this the Court of Appeals for the Third Circuit held as error since this refusal cut off the appeal rights of the registrant. No such issue whatsoever exists in the instant case wherein appellant had already exercised his right to appeal his I-A classification.

Lastly, appellant contends that " . . . appellant's time for appeal under Selective Service Regulations §1626.61(b) had clearly not yet expired when the Board mailed his induction notice. Therefore, by virtue of Regulation §1626.41, the Board's induction order, mailed only three days after the mailing of appellant's Notice of Classification (Form 110), was 'ineffective and void.'"

For this proposition appellant cites two cases: United States v. Hertlein, D.C. Wisc., 1956, 143 F. Supp. 742, 745-746, and Striker v. Resor, supra, 283 F. Supp. 923 (D.C.N.J. 1968).

The only issue in the Hertlein case which might possibly have any bearing on the case at bar is this -- whether, after a registrant has filed an appeal, the local board may reopen his classification and reclassify him, thus cutting off the registrant's original appeal and forcing the registrant to appeal from the new classification. The Court held the Board could not.

It is clear that since the appellant had already taken his appeal pursuant to the applicable regulations, this issue as decided in Hertlein has no relevance to the instant case.

Striker v. Resor was a habeas corpus application which was concerned with the rights to appeal as provided for in 32 C.F.R. 1626.41. There the court held that it was incumbent upon the board to advise the registrant of his rights under that section, but failed to do so.

As indicated above, this issue has no relevance to the instant case wherein appellant has already exercised his right of appeal and where no further right to appeal existed.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the trial court should be affirmed.

Respectfully submitted,

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